APPENDIX

Supreme Court of the United States

October Term, 1977

No. 77-39

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA",
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for a Writ of Certiorari Filed July 6, 1977

Certiorari Granted October 31, 1977

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No. 11444

United States District Court

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM PINKUS, dba "Rosslyn News Company" and "Kamera",
Defendant.

RELEVANT DOCKET ENTRIES

a. 11/6/72 Indictment filed.

b. 12/4/72 Defendant pleads not guilty.

c. 7/18/73 * * * VERDICT, jury finds defendant guilty as charged in Counts 1 thru 11 inclusive.

d. 4/1/75 Received from Court of Appeals certified copy of Judgment of Court of Appeals reversing and remanding to United States District Court for further proceedings * * *.

e. 1/8/76 Filed defendant's proposed jury instructions submitted on behalf of defendant. Filed United States' proposed jury instructions.

f. 1/12/76 MINUTE ORDER: 5th day Retrial By Jury: defendant offer of proof re further evidence denied. Defendant's Motion for mistrial denied. Defendant's Motion for surrebuttal of witness denied. Jury returns verdict of GUILTY on Counts 1 thru 11 of indictment. Referred to P/O for I & R and continued 2/9/76, 9:00 A.M. for sentencing and hearing any of defendant's motions filed and notice for hearing said date. Filed verdicts, notes from jury, exhibits, witnesses and exhibits lists and jury instruction.

g. 2/9/76 Hearing, sentence: defendant's Motion for New Trial, etc. after verdict of GUILTY to Counts 1 thru 11 of the indictment. Defendant's counsel submits motions on pleadings. Court orders motions denied. ENT. 2/12/76. Court orders defendant committed to custody of Attorney General for imprisonment for a period of four years and $1,000.00 fine as to Count 1 of indictment. Counts 2 thru 11, Court orders defendant to four years imprisonment on each Count and imposes a fine of $1,000.00 as to each Count. Sentence on Counts 2 thru 11 to run concurrently with each other and concurrently with sentence imposed in Count 1 of the indictment. Sentence is imposed under the provisions of Title 18 U.S.C. 4208(a)(1). Total fine is $11,000.00. Defendant's Motion for Court to bail pending appeal. Court orders Notice of Appeal to be filed. Notice of Appeal is filed and Court hears Attorney Atkins on Motion. Court orders bond pending Appeal set in the amount of $1,500.00 Corporate Surety. Bond exonerated and defendant notified of his right to appeal. Filed Judgment and issued copies. Entered 2/12/76.

h. 2/10/76 Filed Notice of Appeal as to defendant William Pinkus from judgment entered 2/9/76.

i. 3/1/76 MINUTE ORDER: Correction of sentence as to defendant William Pinkus. Court orders earlier sentence vacated. Count 1: four years imprisonment, pay fine of $500.00. Counts 2 thru 11: four years imprisonment, pay $500.00 fine each count concurrently and concurrently with sentence of imprisonment in Count 1 as to imprisonment only. Total fine is $5,500.00. Sentence pursuant to 18:4208(a)(1). Defendant's Notice of Appeal already filed. Same bond on appeal to apply. Bond on appeal set in amount of $1,500.00 C/S. Earlier bond executed. Entered 3/15/76. MADE SUPPL. JS-3.

RELEVANT CHARGES AND SENTENCING

No. 11444 CD

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
September 1972 Grand Jury

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM PINKUS, dba "Rosslyn News Company" and "Kamera",
Defendant.

INDICTMENT

[18 U.S.C. §1461: Mailing Obscene Material and Advertisements]

(Filed November 6, 1972)

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §1461]

On or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Calin R. Coburn at 4141 Eastern, #1, Las Vegas, Nevada 89109 from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing an obscene illustrated brochure advertising sex films, books and magazines.

COUNT TWO

[18 U.S.C. §1461]

On or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Milton L. Town at 311 Troy Road, Rochester, New York 14618, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means an obscene magazine entitled "Bedplay" could be obtained.

COUNT THREE

[18 U.S.C. §1461]

On or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Toni Mandernach, Odebolt, Iowa 51458, from 1350 North Highland Av., Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means an obscene magazine entitled "Bedplay" could be obtained.

COUNT FOUR

[18 U.S.C. §1461]

On or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant WIL-

LIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Toni Mandernach, Odebolt, Iowa 51458, from Kamera, 1350 N. Highland Ave., Hollywood, California 90028, containing an obscene illustrated brochure advertising sex films, books and magazines.

COUNT FIVE

[18 U.S.C. §1461]

On or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera", knowingly used, and caused to be used, the mails for mailing, carriage in the mails and delivery of a letter according to the directions thereon addressed to Jay W. Becker, 93-14 215th Street, Queens Village, New York 11428, from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing an obscene illustrated brochure advertising sex films, books and magazines.

COUNT SIX

[18 U.S.C. §1461]

On or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera", knowingly used, caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Ben T. Winsor, 1701 Crafton Boulevard, Pittsburgh, Penna. 15205, from Kamera, 1350 N. Highland Ave., Holly-

wood, California 90028, containing an obscene illustrated brochure advertising sex films, books and magazines.

COUNT SEVEN

[18 U.S.C. §1461]

On or about September 17, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a package according to the directions thereon addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from Kamera, 1350 N. Highland Ave., Hollywood, California 90028, containing an obscene magazine entitled "Bedplay" and obscene illustrated brochures advertising sex films, books and magazines.

COUNT EIGHT

[18 U.S.C. §1461]

On or about November 9, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Hal Waller, Box #1273, San Marcos, Texas, 78666, from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means an obscene film described as No. "613" could be obtained.

COUNT NINE

[18 U.S.C. §1461]

On or about November 29, 1971, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Kamera", knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a package according to the directions thereon addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from Kamera, 1350 N. Highland Ave., Hollywood, California 90028, containing a reel of 8mm obscene movie film identified as No. "613" and obscene illustrated brochures advertising sex films, books and magazines.

COUNT TEN

[18 U.S.C. §1461]

On or about March 30, 1972, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Company" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to Ben T. Winsor, 1701 Crafton Boulevard, Pittsburgh, Penna. 15205, from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing an obscene illustrated brochure advertising sex films, books, magazines and playing cards.

COUNT ELEVEN

[18 U.S.C. §1461]

On or about June 19, 1972, in Los Angeles County, within the Central District of California, defendant WILLIAM PINKUS, doing business as "Rosslyn News Com-

pany" and "Kamera" knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the directions thereon addressed to R. Gauthier, 400 North 12th St., Neward, NJ 07107, from 1350 North Highland Ave., Room 4, Hollywood, California 90028, containing obscene illustrated brochures advertising sex films, books, and magazines.

A True Bill

/s/ SHIRLEY A. REUTER
Foreman

/s/ WILLIAM D. KELLER
United States Attorney

SENTENCE

(Dated February 9, 1976)

[Title omitted in printing]

PROCEEDINGS:

HEARING: Deft's motion for new trial, etc.

SENTENCING: after verdicts of guilty to Counts 1 thru 11 of the Indictment.

Defendant's counsel submits motions on pleadings. Court orders motions denied.

Court orders defendant commtd to custody of the Attorney General for imprisonment for a period of four years and a $1,000.00 fine as to Count 1 of Indictment. As to Counts 2 thru 11 the Court orders the defendant commtd to custody of Attorney General for a period of four years as to each count and imposes a fine of $1,000.00 fine as to each count. Sentence as to Counts 2 thru 11 are ordered to run concurrently with each other and concurrently with

the sentence imposed on Count 1 of the Indictment. Sentence is imposed under the provisions of Title 18, USC 4208(a)(1). Total fine is $11,000.00. Defendant's motion for court to set bail pending appeal. Court orders Notice of appeal to be filed. Notice of appeal is filed and Court hears Attorney Atkins on motion. Court orders bond pending appeal set in the amount of $1,500.00 Corporate Surety. Bond exonerated, and defendant notified of his right to appeal. Final judgmnt and issued copies.

CORRECTED JUDGMENT AND COMMITMENT

(Filed March 1, 1976)

[Title omitted in printing]

On this 1st day of March, 1976 came the attorney for the government and the defendant appeared in person and with his attorney, Elliot J. Abelson, retained,

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and verdicts of Guilty to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Indictment, has been convicted of the offense of mailing obscene material and advertisements, in violation of Title 18, United States Code, Section 1461, as charged in Counts 1 thru 11 of the Indictment,

IT IS ORDERED, sentence imposed on February 9, 1976 is vacated and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of Four years and pay a fine to the United States in the amount of $500.00 as to Count 1 of the Indictment, as to Counts 2 thru 11 the defendant is ordered committed to the custody of the Attorney General or his authorized representative for a period of four years as to each count and pay a fine of $500.00 to the United States on each count of Counts 2 thru 11. The imprisonment of the defendant on Counts 2 thru 11 are ordered to run concurrently with each other and concurrently with the sentence imposed on Count 1 of the Indictment. Total fine is in the amount of $5,500.00.

Sentence is imposed under the provisions of Title 18, United States Code Section 4208(a)(1). Defendant's bond is ordered exonerated. Defendant is notified of his right to appeal.

Bond on appeal is set in the amount of $1,500.00 Corporate Surety after notice of appeal is filed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVID W. WILLIAMS
United States District Judge.

/s/ JOSEPH A. MONTAGUE
Deputy Clerk.

TRANSCRIPT OF TESTIMONY

(Trial Commenced January 6, 1976)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Title omitted in printing]

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EXCERPT OF STATEMENT OF DISTRICT JUDGE
DAVID W. WILLIAMS

• • • • •

[58] We have told you that if there is any reason why in your own mind you feel, even from matters that you haven't **[59]** even been asked about up to now, that makes you say, "I don't think I belong on this jury," or, "I don't think I want to be on this jury."

I want to give you another opportunity now to either raise your hand in answer to that question or to speak to it or tell us something that may be in your mind, that you think may touch importantly upon it, so that the lawyers may again exercise their peremptory challenge.

And I come to you again with this, not for emphasis, but only because when you have undergone all of the interrogation that you have, you might sit there and say to yourself, "I wish that I had the opportunity of giving a different answer to one of those earlier questions," or, "I think maybe now that I have thought about it a little, there is something else I ought to tell the Judge about a question that he asked me, or he hasn't even asked this question, but I know what they are trying to do is pick a fair jury, and I know that what we are being called upon to judge, and in all fairness to the lawyers, I think I ought to tell them something I had an interest

in in the past or something that happened to me, or something I studied or had an especial interest in."

Are there any of you who either want to modify a question you were asked earlier, want to change it altogether or want to speak on any subject that you think touches importantly on your qualifications as a juror in this case? **[60]** If so, just raise your hand.

Mrs. Cohrth?

Prospective Juror No. 10: The question in my mind is: Is this available to children? Is this mailing list available to children?

The Court: Counsel come to the bench.

(The following proceedings were held at the bench:)

The Court: I think the answer to that is unqualifiedly no, is that correct?

Mr. Atkins: That is correct. It is part of the stipulation, your Honor.

Mr. Mayock: Your Honor, the evidence in this case will not reflect the mailing to any minors of the particular exhibits in question.

The Court: Okay.

(The following proceedings were held in open court:)

The Court: I wanted to be sure I was answering this correctly, Mrs. Cohrth, and the answer to it is that in no way does it involve any distribution of material of any kind to children, and that the evidence will, that there will be a stipulation even that there has been no exposure of any of this evidence to children.

Now, I thank you for inquiring into that because it **[61]** shows all of us that you are pondering this question, as we want you to ponder it. Thank you very much for calling that to our attention.

* * * * *

STIPULATION

[133] The Court: Mr. Mayock has explained what a stipulation is. I want to just add this, that in this case, as in most cases involving stipulations, it is an effort on the part of counsel who cooperate for the purpose of shortening the trial, and to prevent the necessity of bringing witnesses **[134]** here who would testify to uncontroverted facts. And so, instead of having to bring a person from a far away state to say that he lives there, and that on such-and-such a date he received a transmission of mail that contained such-and-such a thing inside it, counsel have agreed that those facts did in fact occur, and that will be the subject of this stipulation that is being read.

Mr. Mayock: It is hereby stipulated:

"One, on or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery, with knowledge of its contents, a letter, which is Government's Exhibit No. 1, according to the directions thereon, addressed to Calin R. Coburn, a college student, at 4141 Eastern, No. 1, Las Vegas, Nevada 89109 from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books and magazines, and it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Second, on or about July 28, 1971, in Los Angeles **[135]** County, within the Central District of California, defendant William Pinkus, doing business as

'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 2, according to the directions thereon, addressed to Milton L. Town, a retired person at 311 Troy Road, Rochester, New York 14618, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an advertisement giving information where, how and from whom and by what means a magazine entitled 'Bed Play' could be obtained. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Three, on or about July 28, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 3, according to the directions thereon, addressed to Toni Mandernach, a **[136]** housewife, at Odebolt, Iowa 51458, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means a magazine entitled 'Bed Play' could be obtained. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Four, on or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and

intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 4, according to the directions thereon, addressed to Toni Mandernach, a housewife, at Odebolt, Iowa 51458, from 'Kamera,' 1350 North Highland Avenue, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books and magazines. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Five, on or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business **[137]** as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 5, according to the directions thereon, addressed to Jay W. Becker, a retail florist at 93-14 215th Street, Queens Village, New York 11428, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books and magazines. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Six, on or about September 9, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used, caused to be used, the mails for mailing, carriage in the mails, and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 6, according to the directions there-

on, addressed to Ben T. Winsor, an Episcopalian minister, at 1701 Crafton Boulevard, Pittsburgh, Pennsylvania 15205, from 'Kamera' 1350 North Highland Avenue, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books and [138] magazines. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Seven, on or about September 17, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery with knowledge of its contents of a package, which is Government's Exhibit No. 7, according to the directions thereon, addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from 'Kamera' 1350 North Highland Avenue, Hollywood, California 90028, containing the magazine entitled 'Bed Play' and illustrated brochures advertising sex films, books and magazines. And it was defendant Pinkus' intention that this package and its contents be for the personal use of the recipient.

"Eight, on or about November 9, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery [139] with knowledge of its contents of a letter, which is Government's Exhibit No. 8, according to the directions thereon, addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing an advertisement giving information where, how, from whom, and by what means a film described as No. '613' could be obtained. It was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient.

"Nine, on or about November 29, 1971, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery of a package, which is Government's Exhibit 9, according to the directions thereon, addressed to Hal Waller, Box 1273, San Marcos, Texas 78666, from 'Kamera' 1350 North Highland Avenue, Hollywood, California 90028, containing a reel of 8mm movie film identified as No. '613' and illustrated brochures advertising sex films, books and magazines. And it was defendant Pinkus' intention that this package and its contents be for the personal use of the recipient.

[140] "Ten, on or about March 30, 1972, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails and delivery with knowledge of its contents of a letter, which is Government's Exhibit No. 10, according to the directions thereon, addressed to Ben T. Winsor, an Episcopalian minister, at 1701 Crafton Boulevard, Pittsburgh, Pennsylvania 15205, from 1350 North Highland Avenue, Hollywood, California 90028, containing an illustrated brochure advertising sex films, books, magazines and

playing cards. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient."

We are almost finished.

"Eleven, on or about June 19, 1972, in Los Angeles County, within the Central District of California, defendant William Pinkus, doing business as 'Rosslyn News Company' and 'Kamera' voluntarily and intentionally used and caused to be used the mails for mailing, carriage in the mails, and delivery of the contents of a letter, which is **[141]** Government's Exhibit No. 11, according to the directions thereon, addressed to R. Gauthier, a lieutenant in the Internal Affairs Division, Newark Police Department at 400 North 12th Street, Newark, New Jersey 07107, from 1350 North Highland Avenue, Room 4, Hollywood, California 90028, containing illustrated brochures advertising sex films, books and magazines. And it was defendant Pinkus' intention that this letter and its contents be for the personal use of the recipient."

It is further stipulated that neither side in this case will offer any other evidence relating to the matters covered by the above stipulation.

The stipulation is complete and executed by counsel for the respective parties and defendant.

The Court: Is that the defendant's stipulation?

Mr. Atkins: It is, your Honor.

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STATEMENT OF W. MICHAEL MAYOCK,
ASSISTANT UNITED STATES ATTORNEY

[147] Mr. Atkins: Some of these materials, apparently the United States Attorney feels appeal to deviate groups. If that is the situation, if they are fetish materials or materials that he contends appear to appeal to deviate groups, then in that situation independent proof must be offered as to the deviate character of the materials, and none was offered, and I would have to object to those materials which may or may not appeal to deviate groups.

On that basis, I—

The Court: Are you speaking of homosexual-type material?

Mr. Atkins: Homosexual or whatever counsel alluded to in his opening statement as being the deviate groups.

The Court: Do you have any material that fits in that category, that you know of?

Mr. Mayock: There are some photographs in the material that purports to be homosexual.

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STATEMENT OF NORMAN R. ATKINS,
ATTORNEY FOR DEFENDANT

[170] Mr. Atkins: Your Honor, I intend to ask the Court, move the Court to permit the jury to go to a theater to view "Deep Throat" and "The Devil in Miss Jones," after the testimony of Mr. Williams, Variety Magazine as to the record setting propensities.

The Court: What would be the materiality of that?

Mr. Atkins: As being comparable materials, and the acceptance of such materials in this community to show contemporary community standards and what is tolerated and accepted and is being paid for by $5 admission tickets, an overwhelming number, 500,000, 600,000 people.

Mr. Mayock: Your Honor, the Government would object to that attempt to introduce comparison evidence, that there has been no showing that that would be a valid comparison under the Jacobs standard in this circuit.

And moreover, the purpose for which it is being offered is to show community tolerance, whereas the test in this case has to be community acceptance or impact, not tolerance.

[171] Mr. Atkins: Your Honor, one aspect of acceptance is what is being done and the number of persons who have—

The Court: How can you bring about a comparison between a motion picture of the nature of the type that you suggest you would like for this jury to see and the still pictures that constitute the majority of the exhibits here apart from what, a reel of film, is not a reel in itself as a story connected with it or any plot or anything else that takes on the aspects of "The Devil in Miss Jones," or the other photoplays?

Mr. Atkins: Your Honor, the words of the law are that the material must go substantially beyond the limits of candor. Therefore I'm offering the comparison only in terms of candor, not in comparison of theatrical beauty or excellence. I'm only offering there the candor of the description in such films as "The Devil in Miss Jones" and "Deep Throat" are entirely comparable as compared to the film in this case. And the magazine "Bed Play" also. And the visual material and the brochures as well. I'm only offering those so that the jury can be apprised of the fact that these films are just as candid, just as candid as the material in this case, in all respects.

The Court: I don't see that there is a basis for me to accept your offer as comparable evidence, or to allow this jury to view those pictures. And I will have to reject your **[172]** proposal.

Mr. Atkins: Can this be considered an offer of proof, your Honor?

The Court: Yes, and a denial of it.

Mr. Atkins: May I then, as an alternative, state that I have in my possession a silent 8mm version of "Deep Throat," a silent 8mm version of "Behind the Green Door," and I will have a silent 8mm version of the film "The Devil in Miss Jones," which is from the films that were shown in this area for some three, four years now, and that if your Honor is unwilling to have the jury go there, we could have them see these films in the courtroom here, and at a minimum of expense and time.

The Court: I have not seen the film, and I am willing to look at a representative part of it outside the presence of the jury, to make a determination whether I think that there is any basis of comparability.

But until that is done, I will have to stand upon the denial of the offer of proof that has been just made of record.

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EXCERPT FROM DIRECT EXAMINATION OF WHITNEY WILLIAMS

(By Mr. Atkins)

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[283] Q. And do you work? What is your occupation? A. I'm a newspaper man, I'm on the staff of Daily Variety in Hollywood, the show paper, the show business paper.

Q. How long have you worked for Daily Variety? A. Since 1942.

Q. And what is Variety? A. Variety is a trade paper devoted to the entertainment industry in all phases, motion pictures, TV, everything like that.

Q. All right. In the course of your duties are you in charge of the gathering of box office statistics? A. I gather the majority of the figures, yes.

Q. And have you gathered the statistics concerning the box office grosses of the films "Deep Throat" and the film "The Devil in Miss Jones"? A. Yes, I have.

[284] Q. All right. Do you have them with you there? A. Yes, I have.

Mr. Atkins: Your Honor, could I approach the witness?

The Court: No. What do you want?

Mr. Atkins: I simply want to go over his material with him. I think it would be easier.

The Court: No. I don't want you approaching the witness stand, or any other lawyer doing it.

Q. Mr. Atkins: Mr. Williams, do you have the statistics that you have gathered? A. Yes, I have.

Q. And what are they for the year 1972-73?

Mr. Mayock: Objection, no foundation, your Honor.

The Court: Yes. Lay your foundation so as to show how the statistics are gathered, the reliability of them and all the rest of it.

Q. By Mr. Atkins: Mr. Williams, how do you gather your statistics? A. In these particular cases, I have gathered them from the theater itself.

Q. And? A. The theater, the Hollywood Pussy Cat, which showed "Deep Throat" and the theater, the head of the theaters that showed the other picture.

[285] Q. And how do you put these statistics together? How is it done? A. Well, I talk to them once a week and get the previous week's gross, that is the amount taken in at the box office.

The Court: The monetary gross?

The Witness: The monetary gross.

The Court: Not numbers of people that went in?

The Witness: No. But in the case of "Deep Throat" it was one straight price, $5 a head. So that could be divided into the overall gross.

The Court: We are talking about two pictures, one is "Deep Throat," is that correct?

The Witness: Yes.

The Court: Where was it shown, in one theater in this area or more than one?

The Witness: One theater in Hollywood, the Hollywood Pussy Cat.

The Court: And what was the name of the other picture?

The Witness: "The Devil in Miss Jones."

The Court: Where was that shown?

The Witness: That was shown in three different theaters, also in Hollywood, in Los Angeles.

The Court: What are the names of those theaters?

The Witness: Cine Cienega, Cave Corbin and Yale. They are small theaters, but collectively, I should say that **[286]** they have the seating capacity of around 1,330.

The Court: Do I understand that all of those are adult-type theaters?

The Witness: Yes, they are.

The Court: As I understand it your method of collecting the information is to, once a week, call some officer of the theater and ask him the monetary gross income for the previous week?

The Witness: That's true.

The Court: And you make such a recordation, is that correct?

The Witness: That is correct.

The Court: What do you do? Do you publish those figures somewhere?

The Witness: Yes. We take all the pictures that are, what is known in the first-run in Los Angeles and tell what the prospect is for the week, in Los Angeles.

The Court: Are they relied upon, to your knowledge, in the entertainment industry?

The Witness: Yes.

The Court: Who was it that you think would rely upon those figures?

The Witness: The industry. Because we have a reputation down through the years Weekly Variety, which is the parent company, was started in New York in 1905. And Daily **[287]** Variety, which is owned by Weekly Variety has been in existence since about 1933. And it is regarded as sort of the Bible of show business. It is regarded as that.

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DIRECT EXAMINATION OF MR. WHITNEY WILLIAMS

(Resumed)

[293] By Mr. Atkins:

Q. Mr. Williams, do you have before you copies of your compilations that appear in articles in Variety? A. Yes, I do.

Q. Would they represent your summary of your compilations? A. Yes, they do.

Q. Would you take the earliest one that you have—

Mr. Atkins: Your Honor, I have the original Variety, that I'm told the only one that this witness has retained of **[294]** these earlier editions, and I've made Xerox copies of them, of the pertinent portions.

And I would like to have the—I would like to show opposing counsel the originals and ask if he would agree that the Xerox copies could be substituted for the originals.

Mr. Mayock: Your Honor, preserving all of the objections already raised, the Government would have no objection to substituting Xerox copies for the original Variety.

The Court: All right.

Q. By Mr. Atkins: Now taking your earliest article, Mr. Williams, what were the box office grosses for "Deep Throat" and for what period of time? A. For 52 weeks in the year 1973 the gross was two million six hundred seventy-two thousand four hundred seventy-six.

Q. And do you have the article in which that appeared? A. Beg pardon?

Q. Are you reading from the article in which that appeared? A. Yes, in the issue of January the 3rd, 1974 in Daily Variety.

Q. And do you have a Xerox copy of that? A. Yes, I have.

Q. Do you have that in your hand? A. I have it here.

Mr. Atkins: Your Honor, could that be marked **[295]** Defendant's next in order?

The Court: Yes.

The Clerk: Defendant's D.

(The document referred to was marked Defendant's Exhibit D for identification.)

Q. By Mr. Atkins: Do you have, Mr. Williams, do you have a later report on the grosses of "Deep Throat"? A. Yes. In the issue of June the 14th, 1974, at the conclusion of the run of "Deep Throat" at the Hollywood Pussy Cat, it was an 81 week run, and the total for the 81 weeks was three million two hundred seventy-two thousand seven hundred thirty-six dollars.

The Court: The 81 weeks include the 52 weeks in 1973, doesn't it?

The Witness: Yes, it does. It includes the first five weeks in '72, 52 weeks in '73, and I believe 24 weeks in 1974.

The Court: So you said that in 1973 it grossed two million six hundred seventy-two thousand?

The Witness: Yes.

The Court: And the last figure, the last three million dollar figure you gave us includes the two million dollar figure earlier, is that right?

The Witness: Yes.

The Court: All right. So the total gross for the **[296]** entire run was three million two hundred seventy-two thousand dollars.

The Witness: Yes.

Q. By Mr. Atkins: All right now, do you have any current total up to this date, or near up to date or beyond that? A. Well, now in the Weekly Variety, which is published in New York each week, they have a section called the 50 top grossing films, and the—

The Court: Now, counsel, I'm going to have to sustain the objection to this unless you can show that this witness has had some participation in accumulating those figures.

Q. By Mr. Atkins: Well, have you had any participation in the figures you are about to recount? A. The only participation I would have in that is that they include the Los Angeles figures.

The Court: Yes. I will have to sustain the objection to that.

Mr. Atkins: All right.

Q. Now, Mr. Williams, do you have any compilations of your own with regard to "The Devil in Miss Jones," the film "The Devil in Miss Jones" and the grosses of

that film? A. Well, in the January 3rd, 1974 issue of the 10 highest grossing films, of the year, in Los Angeles, "The Devil in Miss **[297]** Jones" is listed in No. 3 position.

Q. Does it have a gross for that? A. Yes, in 37 weeks it grossed one million two hundred nine thousand one hundred eighty dollars.

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[300] Q. By Mr. Atkins: Mr. Williams, when you mentioned that "Deep Throat" was one, No. 1, on a list of ten, and "The Devil in Miss Jones" was No. 3 on a list of ten, who compiled the list of ten that you were referring to? A. I did.

Q. Was that list of ten made up from your own compilations of grosses for the year? A. It was compiled from the year's gross.

Q. So that this is, in effect, the list that you compiled from your own statistical information? A. From my own records.

Q. All right. And would you read that list for us, the top ten that you have listed there that you referred to before. A. The four top?

[301] Q. The ten top, the ten films that you said were comprised in the ten top grossers. A. "Deep Throat," is No. 1, "Billy Jack," the re-issue of "Billy Jack" is No. 2. "The Devil in Miss Jones" is No. 3. "The Last Tango in Paris," No. 4. "Paper Moon," No. 5, "West World" No. 6, "The Day of the Jackal" No. 7, "Live and Let Die" No. 8. "Enter the Dragon"—I may have missed one here. "Enter the Dragon" is No. 9 and "Heartbreak Kid" is No. 10.

Q. Now one last question, Mr. Williams, your figures with regard to these two films, "The Devil in Miss Jones" and "Deep Throat" have to do only with the Los Angeles area, is that correct? A. Just in the Los Angeles area.

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EXCERPTS FROM CROSS EXAMINATION OF DR. MICHAEL H. WARD

By Mr. Mayock:

[396] Q. So, could what a child reads or sees influence his sexual direction, if that was culturally provided him? A. Yes, but it has to bear some consistency to the overall cultural and environmental context. A child seeing one thing or reading one book or reading a series of books that present sexual mores inconsistent with the overall mores around him would probably not be influenced greatly by them. What the child's parents do with respect to sexual behavior, what seems to be expected from him in terms of his peer groups, and so forth, as well as his biological complement would appear to be the major determinants.

A. [sic] Could what we might term a borderline child be influenced to go over into later deviate behavior by virtue **[397]** of what he sees or reads?

Mr. Atkins: Your Honor, may we approach the bench?

The Court: For what purpose?

Mr. Atkins: I think that we should discuss this point. Children have not been involved in this case, your Honor.

The Court: Has nothing to do with the appropriateness of cross examination.

The objection is overruled.

Read the question to the witness, please.

(The question was read.)

The Witness: What do you mean by borderline child, in what regard?

By Mr. Mayock:

Q. For one who is, say, on the cultural cusp, if you will, his family is providing him with certain materials

that he may read if he chose; he is marginal as far as what his sexual direction is going to be. A. It appears at first glance to be an easy question to answer, but there are really a lot of variables involved; what is the age of the child? What has been his prior experience? What do you mean by cultural cusp? What are his parents' tendencies? If I elucidate each one of those I could make some prognosis about the child's development.

Q. You feel children shouldn't see sexual materials **[398]** until they reach a certain age? A. I generally do, yes.

Q. What would that age be? A. Well, we are talking about the late adolescence, late teens. It's reasonable to me to forbid people under 18 years of age from ready access to sexually explicit material. The basic reason is I think the psychological and physiological complements are really in too much of a state of flux in the early teens, and material could have a disproportionate influence on what happens to the child.

Other people feel, and I can agree to a certain extent, that monitored exposure to sexually explicit material, even in younger children is helpful, and I'm sure that is the case in the sense of planned sexual education programs. But in general I'm in agreement with the notion that adulthood would be a requisite for the ready availability of sexually explicit material.

Q. So then, it would not be a psychologically or sexually healthy thing for a child to view the exhibits in this case ? A. Probably not in general.

Mr. Atkins: Same objection, your Honor.

The Court: I think so, sustained.

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STATEMENT OF NORMAN R. ATKINS,
ATTORNEY FOR DEFENDANT

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[537] Mr. Atkins: No, your Honor. I want to offer to show the jury the films "Deep Throat," and "The Devil in Miss Jones."

The Court: What for?

Mr. Atkins: As comparable materials, and also in amplification of the testimony of Mr. Williams from Variety Magazine as to the numbers of people who saw that, these two [538] films.

The Court: No, I'm not going to permit that, Mr. Atkins.

Mr. Atkins: May they be marked, your Honor? I'm offering them. I might say this—

The Court: Yes, I will let them be marked, and they may be received for any appellate purposes that may follow.

Mr. Atkins: Well, there is another purpose, your Honor; the other purpose that I haven't yet stated is that each Court must make its own specific determination as to the obscenity vel non of the material, and if it becomes appropriate, I will be asking your Honor to make a determination of your own, and I would then ask that your Honor watch these movies, "The Devil in Miss Jones" and "Deep Throat" in order to make a comparison of them with the materials in evidence here so that your Honor can deal with that issue.

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[539] Mr. Atkins: Your Honor, may I make an offer of proof with regard to those, K and L, the films?

The Court: Yes.

Mr. Atkins: That they are the silent versions of the films shown in the Los Angeles area and throughout the Central District of California, that they are 8mm versions of [540] the film shown in the theaters, which are both the theater size, that they exemplify in detail the exactly comparable descriptions of sex and oral-genital sex and natural sex and unnatural sex of all kinds and descriptions, which make them absolutely comparable to the materials involved in this case in all respects. And that therefore these films would be of great aid to the jury to determine—to help them determine what the standards are with regard to acceptance of explicit sexual depictions in the Central District of California.

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[541] The Court: Mr. Atkins, that is true, is it not, that these are not films of the full length shown in the theaters, but that they are reduced, or altered versions.

[542] Mr. Atkins: Your Honor, may I say yes, but may I amplify?

The Court: Yes.

Mr. Atkins: The answer to that is yes, but I have offered to the Court before that at the defense expense we would take the jury to the theater where the full length sound-color versions are showing right now and are readily accessible, and at the defense expense we will pay for the bus and the admission and the popcorn and whatever else. We will take this jury to the movies there if your Honor would rather do that.

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EXCERPT FROM DIRECT EXAMINATION OF DR. JAMES RUE

By Mr. Mayock:

* * * * *

[552] Q. Have you had occasion to study and have professional contact with members of normal sexual groupings and deviate sexual groupings during your practice as a counsellor?

Mr. Atkins: Your Honor, may we approach the bench very briefly?

The Court: Yes.

(The following proceedings were held at the bench:)

Mr. Atkins: I think this would be an appropriate time **[553]** to object to the offer of any evidence regarding the deviate sexual groups. Again, that should have been done on the Government's case in chief if it was going to be done at all. And—

The Court: Is that a subject that you intend to go into?

Mr. Mayock: There will be, yes, there will be discussion of that. Defendant's own witnesses talked about deviate sexual—

The Court: I think they did.

Mr. Atkins: The only respect in which they did was in cross-examination as to their expertise, and not as a matter of offer of proof on that subject, your Honor. I was not offering proof, and they did not offer any.

The Court: I won't preclude him from going into the subject, but I leave it open to you to make what you may consider to be proper objections to any particular questions or area of inquiry.

* * * * *

[571] Q. What does the material contain which you examined, these exhibits? Not necessarily those in front of you, just in general, what was the general subject matter? A. I think that the total thrust of the exhibits, the material that I have viewed have dealt with sex, but a particular kind of sex; sex without love, sex without tenderness, sex without caring, casual sex, group sex, homosexual sex.

[572] Q. In going through these exhibits, did you have occasion to prepare any sort of a summary or synopsis of what was depicted in various exhibits? A. Yes. The first material that I saw happened to be Xeroxed copies of the material, black and white. And from these I did sort of my own little summary of what I saw or felt was in evidence to me other than intercourse.

Q. What sort of breakdown did you have as to types of sex that you saw in Exhibits 1 through 11? A. May I ask a question? Do Exhibits 1 through 11 include this magazine?

Q. Yes, it does. A. Does it include the film?

Q. Yes, it includes the film, it includes all of that. A. All right. The classifications that I was checking to find out the incidents in the publications were one, oral sex, two, group sex, depictions of this, three, homosexual sex, including lesbianism, four, sex with animals, five, extraneous devices that might be introduced in the process of sex.

The next category I listed was anal sex. And then the last two were masturbatory sex, or masturbation. And finally sadomasochism, or sado-bondage type sex.

Q. And did you, in going through the material, classify as to each exhibit what was reflected in the particular exhibit **[573]** as to those groupings you have listed? A. I went through the materials and numbered the exhibits and then just put little checks when I found that

that particular form or type of sex was presented. And I made a little chart just so that it would give me an idea, for example, of the exhibits, how many of the exhibits had anything to do with animal, how many of the exhibits had anything to do with anal intercourse, how many with a foreign device, and so forth.

Q. Doctor, do you, as a result of your examination, the preparation of this list, do you have an opinion as to whether the dominant theme, the dominant theme of the material taken as a whole appeals to the prurient interest in sex of either the average person or a clearly defined sexually deviate group?

Mr. Atkins: Same objection, your Honor, I have made before on the ground that it's improper rebuttal in general, and in particular that it refers to a deviate group and again as to the doctor's qualifications.

The Court: Those objections are overruled.

The Witness: I do.

Q. By Mr. Mayock: What is that opinion? A. That this material does appeal to the prurient interest of the average person in the community as well as deviate particular groups.

Q. Would you please, just talking about the average person [574] in the community, sets forth the reasons for that opinion that you arrived at, and if you will, perhaps you could start by using the magazine "Bed Play," as an example. That is Exhibit 7. A. Well, there are many regards, but the average person in California, or any other state of the union, does not engage in group sex, the average person does not. Sexually deviate groups will do this.

This is depicted throughout just about all of the exhibits in this case.

The average person does not utilize foreign devices in sexual relations.

The average person does not engage in sadomasochistic games or bondage forms of sex play.

Anal intercourse is not a generally acceptable form of intercourse for the average person.

Oral sex probably, I would exclude from the other categories in that I think that it is probably engaged in at some time or other, or even possibly regularly by the average couple at some time in the life of their relationship.

Q. Doctor, in coming to the conclusion that the material appears to you to appeal to a prurient interest in sex and morbid or shameful interest in sex, did you pay attention to what the material showed as a story line, if any? A. Well, the nearest thing to a story line that I can [575] find is in the short film where it would appear that one couple comes to the residence of another couple. But that is as near as it comes to the totality of the exhibits. It sort of fades there because it's sort of like tag sex; she has relations with one and the other one gets mad and goes home, or something, then now it's time for the other man to have sex with her. These are not average circumstances by any stretch of the imagination.

Mr. Atkins: Your Honor, could I have that last answer re-read, please?

The Court: Yes.

(The record was read.)

The Witness: Thank you, your Honor.

Q. By Mr. Mayock: Dr. Rue, do you use as one of your criteria in evaluating whether the matter appealed to, predominantly to a morbid or shameful interest in sex by looking to see what the focus of the individual pictures was as to whether it was on, say, the genital area? A. Well, throughout the entirety of the material in question are extreme closeups of the genitalia.

Q. Could I direct your attention to the inside back cover of the Exhibit "Bedplay," Exhibit 7-A. Therein appears a photograph mostly of a female's face and hair and a penis with what appears to be, having ejaculated and sperm running down the side of the woman's face towards her ear. Do you see that exhibit in front of you, that portion of it? **[576]** A. Yes, I do.

Q. In your opinion does the focus of the pictures on the genitalia have, in this situation, have a relationship to its classification possibly as being an appeal to the prurient interest of the viewer? A. It's the whole purpose, the whole technique of presenting the material, as I would see it, is to do the extreme closeup, show spermatozoa flowing forth from the penis, let this drip across the mouth of the woman, meant to be an appeal to the shameful or the morbid.

Three people in the picture before me, here are three people having a sexual relationship. One would appear the male has the penis in the anus of one woman, the other woman is stroking the testes of the male, and mouthing the breast of the other woman. A typical example again of appealing to arouse the shameful or morbid, because if it didn't, if it didn't arouse that shameful or morbid, then this kind of sexual behavior for the average person would be natural, and it is not.

Q. Doctor, directing your attention to the first page or the cover page of Exhibit 7-A, "Bedplay," where appears two women, I can't tell, but at least one of them has sperm on the side of her face near her mouth. They are both lying on, around the hip area of a male. What would you say about the focus of that particular photograph as to whether it's intended **[577]** to appeal to the morbid or shameful interest of the viewer in sex. A. Just the fact that the camera angle itself has the penis where it occupies almost a fourth of the page, with three adult

figures in that picture, I think is a very graphic means used by a photographer to accentuate the unhealthy, the abnormal.

Q. Looking through this magazine "Bedplay," are the poses of the individuals depicted therein natural or strained or unnatural, or what? A. Well, the inside cover, which I described previously, with the three people engaging in sex, I think is an unhealthy, unnatural form of sexual play.

The picture right above that where the male is licking the anus of the woman while she mouths the penis, I don't think it is typical at all in terms of love making.

The masturbatory scenes where the woman is using fellatio, which is mouthing the penis of the male while she masturbates herself, no, not—again the same classification.

The next page has the scene of a woman attempting to lick her own breast while a reverse picture of attempted intercourse is supposedly taking place.

The next page to that, some sort of a G-string is being pulled down by the man again as he licks the anus, and again the continuation of group sex, which is so predominant in **[578]** this material would again suggest that they are striving as best they know how to appeal to the unnatural, to the unwholesome side of sex, which would have particular interest, particularly to deviate groups, the homosexual one being obvious.

But again even to the curio[illegible]f the average person who might look at it there m[illegible]be, certainly would be a curiosity to look at it. Bu[illegible]hat do[illegible]'t necessarily mean it's something that would be acceptable to that person.

Q. Have you had any clinical experience, doctor, in conjunction with your counselling that would illustrate the effects of the viewing of matter of a nature similar

to this on the viewer? A. It happens to be something that I have followed very closely for the past 15 years, and have documented cases wherein the use of various forms of obscenity have had deleterious effect upon the marital relationship, or in the minds of the young person who may be contemplating marriage.

Mr. Atkins: Move to strike as to young people.

The Court: Overruled. The motion is denied.

The Witness: I have a case at the present time where the father—

Mr. Atkins: Same objection, your Honor, except that in a different form. Move to strike, because apparently these are isolated cases, and his testimony is not directed at the **[579]** average person.

The Court: The motion is denied.

The Witness: They are average cases of sexual disfunction of this particular category.

In the case that I'm currently dealing with the father has molested his own daughter after having come from an adult book store, and a history of seeking out the so-called—

Mr. Atkins: Move to strike, your Honor, and move for a mistrial.

The Court: The motion is denied.

Proceed, sir.

The Witness: I have many times documented the fact that when one's spouse can talk the other spouse into partaking in viewing obscenities, that these almost inevitably lead to a worsening of the sexual relationship between the husband and the wife, and have often ended up in divorce.

A case in particular that is typical of this kind of case is when the husband kept prevailing upon his wife to go with him to an X-rated, so-called X-rated motion picture, and he brought magazines

home to prepare her. And she did go to the X-rated movie, and he forced her to go to the second one. She became—she was already frigid, meaning she is unable to reach organism, [sic] now she will hardly have sex with him because this has so upset her emotionally in light of what her vision **[580]** of love and tenderness and kindness and commitment is, that it's done a great disservice to this particular couple.

Q. By Mr. Mayock: Doctor, looking through this magazine "Bedplay" Magazine, do you see any of these qualities you just named, love, tenderness, or affection? A. I don't find it in any of the exhibits.

Q. Doctor, in determining whether there is a prurient appeal as to predominant theme of the matter in question, do you also look at the language that accompanies the text? A. Yes. I noted for example, they are offering for sale in, I think it is Exhibit 8, a publication called "Female Pedophilia." Pedophilia is sex with a child. I noted another one, I don't remember which exhibit it's in, but I noted another one where it has to do with the elderly, where the picture looks like, although I'm not exactly certain, the picture, Xeroxed copy looks like a young girl, certainly under the age of 18, mouthing the penis of a man that looks like he's 70 years, 75.

Q. Could you look at Exhibit 11-A, and looking on that page on the right upper quarter do you see an advertisement for a film called "Dirty Old Man?" A. Yes, that is the one that I had reference to, yes.

Q. Is that Exhibit before you more clear than— A. Well, I'm looking again at the Xerox copy. I don't have the, unless it's—

[581] Q. The original is in front of you. A. Then I am convinced, not surmising that it looks like about a 16, 15 year old girl with a man at least 70.

Q. What would be the appeal of that particular photograph that advertises a movie? A. I think to a deviate group that might be described as a sociopathic type of person, which we would call a character disorder. These are people who have little conscience of any type in terms of what is right or wrong in their mind. It's just complete themselves, pleasurize themselves. That would appeal to that particular large grouping of people, and these are very ambulatory people; people working jobs, and so forth, but who have this particular kind of orientation or hangup about guilt or a conscience.

Q. Doctor, directing your attention back to Exhibit 7-A, the "Bedplay" Magazine, and turning to the pages therein, wherein it's captioned "In the Front Door and out the back," there is attention involving a hero of the film, "Flash Cremon," and underneath that is large language as follows: "We counted and no less than 35 shots dripped from the silver screen and all come from old flasheroo."

Skipping a line, "Fortunately the producers found look alike stud-ins for a squirt here and there. Certainly different work for extras in this film."

Now, could consideration of that language operate as **[582]** part of the basis for your opinion that the predominant theme of the matter was to a morbid or shameful interest in sex? A. Yes. I remember reading that. I do not have that before me. I wasn't able to locate it, but I remember reading that.

And I think again there is a rather graphic sort of dramatic appeal toward this large group of people that I put in that particular classification of borderline in terms of conscience or any feeling about right or wrong.

And then in particular having to do with those particular groups such as men who, or women who would sexually molest a child. That appeal is in this literature.

Q. Doctor, turning your attention to Exhibit 9, do you see that before you in the original form? A. 9-B maybe? 9-C maybe, or 9-D?

Q. Well, let me start with a specific. Why don't we start with 9-E? A. Okay.

Q. Do you see there on a photograph of a female apparently engaged in sex with what appears to be a German Shepherd dog? A. Yes.

Q. In your opinion, doctor, is that a film that would appeal to the prurient interest of the person who would view that, or that photograph? **[583]** A. Yes, of the average person in the community as well as sexually deviate groups.

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[588] Q. By Mr. Mayock: Doctor, is the test for prurience the actual appeal of the material, as you understand that test? A. Yes.

Q. And does this material appeal to the prurient interest of the average person in the community? A. Yes.

Q. Does it appeal to the prurient interest of a member of **[589]** a sexually deviate group? A. Yes.

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STATEMENT OF JUDGE DAVID W. WILLIAMS

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[693] The Court: • • • I think you also wanted to put in the record the fact that I had indicated that I would see parts of "The Devil in Miss Jones" and "Deep Throat" and rule concerning whether I would permit this jury to see the film that has been offered. And I have seen a part of the film and feel—

Mr. Atkins: Which film?

The Court: Of "Deep Throat." And feel that it would not be proper for the films that have been offered to be shown this jury.

I will reject that offer.

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[785] THE COURT'S CHARGE

The Court: Members of the jury, now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, [786] it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court; just as it would be a violation of your sworn duty, as judges of the facts to base a verdict upon anything that the evidence indicates.

Justice through trial by jury must always depend upon the willingness of each juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment, and the denial made by the "Not guilty"

plea of the accused. You are to perform this duty without bias or prejudice as to any party.

The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court and reach a just verdict, regardless of the consequences.

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the law permits nothing but legal evidence presented before [787] the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case,

the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge. So, if the jury views the [788] evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence.

An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence—such as the testimony of an eyewitness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Statements and arguments of counsel are not evidence in the case, are not evidence, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

The court may take judicial notice of certain facts or events. When the court declares it will take judicial notice of some fact or event, you may accept the court's [789] declaration as evidence and regard as proved the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judge of the facts.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and

all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed; and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

If a lawyer asks a witness a question which contains [790] an assertion of fact you may not consider the assertion as evidence of that fact. The lawyer's statements are not evidence.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

A presumption is a rule of law which permits the jury to find the existence of one fact from proof of another fact.

A presumption may be overcome by evidence. Your duty is to determine the facts on the basis of all of the evidence. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's testimony, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at **[791]** all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

The testimony of a witness may be discredited or impeached by a showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of the statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to **[792]** distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or an omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those who we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and **[793]** experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

The testimony of an accountant or charts or summaries prepared by him, and admitted in evidence, are received

for the purpose of explaining facts disclosed by books, records, and other documents which are in evidence in the case. Such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard them.

In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that, you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of **[794]** all evidence that has been produced, the jury may consider the prosecution's failure to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence and available.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence, and no adverse inferences may be drawn from his failure to do so.

To constitute the crime charged in the indictment there must be the joint operation of two essential elements, an act forbidden by law and an intent to do the act.

Before a defendant may be found guilty of a crime the prosecution must establish beyond a reasonable doubt that under the statute described in these instructions de-

fendant was forbidden to do the act charged in the indictment, and that he intentionally committed the act.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable **[795]** consequences of acts knowingly done or knowingly omitted.

It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with specific intent, as charged.

Intent and motive should never be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

Good motive alone is never a defense where the act done or omitted is a crime. So, the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or **[796]** other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake, or accident or other innocent reason.

As stated before, with respect to acts charged in this case, specific intent must be proved beyond reasonable doubt before there can be a conviction.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

It is the duty of the court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the court may have been addressed during the trial of this case.

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections.

[797] Upon allowing testimony or other evidence to be introduced over objection of an attorney, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the court has sustained an objection to a question addressed to a witness the jury must disregard the question

entirely, and may draw no inference from the wording of it, or speculate as to what the witness would have said if he had been permitted to answer the question.

The indictment in this case is in eleven counts.

Count 1 charges that on or about July 28, 1971, in this judicial district, defendant William Pinkus knowingly used, and caused to be used, the mails for mailing, carriage in the mails, and delivery of a letter according to the instructions thereon addressed to Calin R. Coburn, 4141 Eastern, No. 1, Las Vegas, Nevada from 1350 North Highland Avenue, Hollywood, California, containing an obscene illustrated brochure advertising sex films, books and magazines.

As to the remaining counts I am going to summarize them in a fashion that will be understandable to you.

Count 2 charges that on or about July 28, 1971, within this judicial district, the defendant William **[798]** Pinkus knowingly used, and caused to be used the mails for mailing, and for the delivery of a letter according to the directions thereon addressed to Miton Town, in Rochester, New York, from the Highland Avenue address in Hollywood, California, containing an advertisement giving information where, how, from whom, and by what means an obscene magazine entitled "Bed Play" could be obtained.

Count 3 charges that on or about July 28, 1971, in this judicial district, the defendant William Pinkus caused to be used the mails for mailing and the delivery of a letter according to directions, addressed to a Toni Mandermach in Odebolt, Iowa, from the Highland Avenue address in Hollywood, containing an advertisement giving information where, how, from whom, and by what means an obscene magazine called "Bed Play" could be obtained.

Count 4 charges that on or about September 9, 1971, in this judicial district, the defendant William Pinkus caused to be used the mails for mailing and the delivery

of a letter according to the directions, addressed to Toni Mandermach in Odebolt, Iowa, from the Highland Avenue address in Hollywood, containing an obscene illustrated brochure advertising sex films, books and magazines.

Count 5 charges that on or about September 9, 1971 in this judicial district, the defendant William Pinkus knowingly caused the mails to be used for the delivery of a **[799]** letter addressed to Jay W. Becker, Queens Village, New York, from the Highland Avenue address in Hollywood, California, containing an obscene illustrated brochure advertising sex films, books and magazines.

Count 6 charges that on or about September 9, 1971, in this judicial district, defendant William Pinkus caused the mails to be used for the delivery of a letter addressed to Ben T. Winsor in Pittsburgh, Pennsylvania, from the Highland Avenue address in Hollywood, California, containing an obscene illustrated brochure advertising sex films, books and magazines.

Count 7 charges that on or about September 17, 1971, in this judicial district, the defendant William Pinkus caused the mails to be used for the delivery of a package delivered to Hal Waller, San Marcos, Texas, from the Highland Avenue address in Hollywood, containing an obscene magazine entitled "Bed Play" and obscene illustrated brochures advertising sex films, books and magazines.

Count 8 charges that on or about November 9, 1971, in this judicial district, defendant William Pinkus caused the mails to be used for delivery of a letter addressed to Hal Waller in San Marcos, Texas, from the Highland Avenue address in Hollywood, California, containing an advertisement giving information where, how, from whom, and by what means an obscene film described as No. "613" could be obtained.*

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*The next numbered page in the original transcript is 801.

[801] Count 9 charges that on or about November 29, 1971, in this judicial district, defendant William Pinkus caused the mails to be used for delivery of a package addressed to Hal Waller, San Marcos, Texas, from the Highland Avenue address in Hollywood, California, containing a reel of 8-millimeter obscene movie film identified as No. "613" and obscene illustrated brochures advertising sex films, books and magazines.

Count 10 charges that on or about March 30th, 1972, in this judicial district, defendant William Pinkus caused the mails to be used for delivery of a letter addressed to Ben T. Winsor, Pittsburgh, Pennsylvania, from the Highland Avenue address in Hollywood, California, containing an obscene illustrated brochure advertising sex films, books, magazines and playing cards.

Count 11, the last count, charges that on or about June 19, 1972, in this judicial district, defendant William Pinkus caused the mails to be used for delivery of a letter directed to R. Gauthier, Newark, New Jersey, from the Highland Avenue address in Hollywood, California, containing obscene illustrated brochures advertising sex films, books, and magazines.

Section 1461 of Title 18 of United States Code, under which this action is brought, this indictment is returned, provides in part that: "Every obscene, lewd, lascivious, **[802]** indecent, filthy or vile article, matter, thing, device or substance; every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such matters, articles or things may be obtained is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared

to be unmailable, or knowingly causes to be delivered by mail according to the directions thereon, shall be guilty of an offense against the laws of the United States."

Three essential things are required to be proved in order to establish the offense charged in Counts 4, 5, 6, 7, 9, 10 and 11 of the indictment:

FIRST: That the advertisements, film and photographs mentioned in those counts are obscene, as that term will be defined for you in my instructions.

SECOND: That the defendant willfully deposited, or caused to be deposited, letters or parcels containing such obscene advertisements, film and photos, for mailing and delivery by the Post Office Department of the United States.

THIRD: That the defendant knew that the letters contained such obscene advertisements at the time the letters **[803]** were deposited for mailing and delivery.

You are instructed that you must find the Government has proved the second and third requirements, since the defendant has stipulated to them.

Three essential things are required to be proved in order to establish the offenses charged in Counts 1, 2, 3 and 8 of the indictment.

FIRST: The advertisements or notices give information, directly or indirectly, where, or how, or from whom, or by what means certain pieces of obscene material might be obtained.

SECOND: The defendant willfully deposited, or caused to be deposited, letters containing advertisements or notices for mailing and delivery by the Post Office Department of the United States, and

THIRD: That the defendant knew that the letters contained such advertisements or notices at the time the letters were deposited for mailing and delivery.

You are instructed that you must find the Government has proved the second and third requirements since the defendant has stipulated to them.

As to the first requirement it charges that advertisements giving information as to how and from what source obscene material might be obtained. In order to find the defendant guilty under Counts 1, 2 and 3 you must first **[804]** determine that the matter advertised, that being "Bed Play" magazine, was obscene in accordance with the instructions given by this court.

As to Count 8, in order to find the defendant guilty you must find that film No. "613", the one that was shown you earlier in this trial, was in fact obscene according to the instructions given you by this court, and was the subject of the advertisement.

The gist of the offense alleged in the indictment is the charge that the defendant willfully misused the United States mail for the delivery of obscene photographs or pictures, or for the delivery of information where, how, from whom, and by what means obscene materials could be obtained.

"Obscene" means something which deals with sex in a manner such that the predominant appeal is to prurient interest; which, when considered as a whole, and not part by part, appeals to prurient interest in a way or manner substantially beyond the acceptable limits of candor in dealing with matters relating to sex, as established at the time of its dissemination by the current standards of the community as a whole, and which is utterly lacking in redeeming social value or importance.

An appeal to prurient interest is an appeal to a morbid interest in sex, as distinguished from a candid interest **[805]** in sex.

The constitution of the United States protects the right of the individual to freely publish and distribute magazines,

films, books and material on all subjects, including the subjects of sex and nudity. Thus, sex and nudity may be freely portrayed and discussed in novels, films, magazines, medical texts, psychological works, artistically and photographically.

Freedom of expression is fundamental to our system, and has contributed much to the development and well-being of our free society. In the exercise of the constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely and publicly, so long as the expression does not fall within the area of obscenity. However, the constitutional right to free expression does not extend to the expression of that which is obscene under the law as I have stated it to you.

With regard to the three essential elements just mentioned, you are hereby instructed that in order to find the materials involved in the within case legally obscene the materials must be found to violate all three of the stated elements. Thus, if you should find, for example, that the materials did appeal to the prurient interest and did violate contemporary community standards but was not "utterly without redeeming social importance" you must acquit. **[806]** Likewise if, for example, the materials did violate contemporary community standards and was "utterly without redeeming social importance" but did not appeal to the prurient interest, you must acquit. The point is the materials must violate all three of the stated three essential elements in order for you to find that it is legally obscene.

In order to support a finding of obscenity, three elements must be found. These three elements are reflected in the following three tests:

The first test to be applied, in determining whether a given picture is obscene, is whether the predominant

theme or purpose of the picture, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of mailing.

The mere fact that a picture of a nude woman may have some appeal to prurient interest does not meet the test. The appeal to prurient interest must be the predominant or principal appeal of the picture. In other words, the principal appeal of the picture must be to a morbid interest in sex, as distinguished from a candid interest in sex.

In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, **[807]** considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture.

Thus the brochures, magazines and film are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the sensitive and the insensitive, in other words, you must include everyone in the community.

It is a matter of common knowledge, of which the court takes judicial notice, that people differ widely in their tastes with regard to the propriety of certain pictures. What may appear to some people to be bad taste or offensive may appear to be amusing or entertaining to others. Obscenity is not a matter of individual taste. The personal opinion of a juror as to the material here in question

is not the proper basis for a determination whether or not the material is obscene. As stated before, the test is how the average person of the community as a whole, that being the Central Judicial District of California, would have viewed the material at the time it was mailed.

[808] In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life.

If the predominant appeal of the pictures in question here, taken as a whole is an appeal to the normal interest in sex of the average person, the jury should acquit the accused.

The second test to be applied, in determining whether a given picture is obscene, is whether the material is patently offensive because in its description or representation of sexual matters it violates, or goes substantially beyond what was permissible according to the current standards of the community as a whole.

For purposes of this second test only the community to be considered is defined as consisting of the seven counties which comprise the Central District of California. Those counties are San Luis Obispo, Ventura, Santa Barbara, San Bernardino, Riverside, Los Angeles and Orange.

In applying this test, each brochure, magazine or film considered as a whole, and not part by part, must be measured by those contemporary or current standards in effect at the time the brochures, magazines and film was mailed; and the standards of the entire community must be considered, in determining the limits of candor in the description or **[809]** representation of sex which are acceptable in the community.

Contemporary community standards are set by what is in fact by what is accepted in the community as a whole; that is to say, by society at large or people in

general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge, of which the court takes judicial notice, that customs change, and that the community as a whole may from time to time find acceptable that which was formerly unacceptable, and not infrequently find presently acceptable that which some particular group of the population may regard as an unacceptable appeal to prurient interest.

The third test to be applied, in determining whether a given brochure, magazine or film is obscene is whether, taken as a whole, it is completely and utterly lacking in social value or importance. If the work has a minimum of artistic or other social value, then it is not obscene, even though it may appeal to prurient interest in sex in a manner substantially beyond the acceptable limits of candor established by the current standards of the community as a whole at the time the work was mailed.

Nudity in and of itself is not obscenity.

The fact that a film or magazine deals with such subjects as sex, prostitution, homosexuality, lesbianism, adultery, rape, incest, oral-genital contact, or some other **[810]** sexual deviation or aberration, does not mean that the film or magazine is, for that reason alone, obscene under the statute herein. You must determine legal obscenity in accordance with the law as I have given it to you.

A book or magazine is not obscene merely because it depicts a relationship which is contrary to the religious precepts of the community.

Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not

limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your **[811]** decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, or whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the distributors' sole interest is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity.

In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation.

You are here to determine the guilt or innocence of the accused from the evidence in the case. You are not

called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are also guilty. But if any **[812]** reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the accused not guilty.

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges—judges of the facts. Your sole interest is to **[813]** seek the truth from the evidence in the case.

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection,

it is your recollection which should control during your deliberations.

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Upon retiring to the jury room, you will select one of your number to act as foreman or forewoman. The foreman will preside over your deliberations, and will be your spokesman here in court.

A form of verdict has been prepared for your convenience, and it states, after the caption of the case:

"We, the jury in the above entitled cause, find the defendant WILLIAM PINKUS . . ." and then there is a blank line for the insertion of the word "Guilty" or the words "Not guilty as charged in Count 1 of the indictment," another blank line for the insertion of the word "Guilty" or the words "Not guilty, as charged in Count 2 of the indictment." And so on down through Count 11. Each count to be decided separately.

You will take this form to the jury room, and when **[814]** you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form to state the verdict upon which you unanimously agree, and then return with your verdict in the courtroom.

It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience, is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreman, or by one or more

members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing; and the court will never communicate with any member of the jury on any subject touching the merits of the case, other than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person—not even to the court—how the jury stands, **[815]** numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached an unanimous verdict.

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[822] The Court: In the case of United States vs. Pinkus, let the record show that all the members of the jury are in their places and the defendant and counsel are before the court.

Mr. Sellers, you have been elected foreman of the jury, and I have your note indicating that the jury would like to have reread that instruction pertaining to pandering; is that correct?

The Foreman (Mr. Sellers): Yes, sir.

The Court: All right. I will reread that instruction **[823]** for you, reminding you that you are to consider the so-called three-prong test that I have indicated that would have its place in determining whether there was obscenity, and reminding you also of the admonition that the Government must prove the defendant's guilt beyond a reasonable doubt. And I will reread this instruction to you at your request.

Having covered the three elements of obscenity, there is one additional matter you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you.

In making this determination you are not limited to the materials themselves.

In addition, you may consider the setting in which they were presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale, and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may [824] consider the evidence of pandering to assist you in your decision.

Such evidence is pertinent to all three elements of the basic test of obscenity.

The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the distributors' sole emphasis is on the sexually provocative aspects of the publications, that fact may be decisive in the determination of obscenity.

In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with

respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation.

That constitutes a rereading of the instruction that you have asked and I will ask you now if you will please step down and follow the bailiff and return to your deliberation.

JUDGMENTS IN QUESTION

No. 76-1393

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA",
Respondent-Appellant.

The Opinion of the Court of Appeals for the Ninth Circuit (April 7, 1977) appears in the Petition for Certiorari, p. 2a.

The Order of the Court of Appeals for the Ninth Circuit (June 6, 1977) appears in the Petition for Certiorari, p. 1a.

ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING PETITION FOR A WRIT OF CERTIORARI

No. 77-39

SUPREME COURT OF THE UNITED STATES

WILLIAM PINKUS, d.b.a. "ROSSLYN NEWS COMPANY" and "KAMERA",
Petitioner,

v.

UNITED STATES,
Respondent.

ORDER ALLOWING CERTIORARI. Filed October 31, 1977.

The petition for a writ of certiorari is granted.